In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 684

LANGHORNE CARTER RORER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 724

FRANCIS A. SIMPSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. V, 20)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1964. Petitioner Rorer filed a petition for

[1] The record is in five volumes. Volumes II, III and IV are the transcript of the trial.

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a writ of certiorari on November 12, 1964.[2] The Chief Justice extended the time for petitioner Simpson to file a petition for a writ of certiorari to and including November 27, 1964, and it was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether execution of the search warrant at petitioner Rorer's home violated his constitutional or statutory rights.

2. Whether the evidence was sufficient to sustain petitioner Simpson's conviction.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted on the first, fifth and sixth counts of a seven-count indictment (R. III, 77–78; R. IV, 16–17) charging conspiracy and substantive offenses involving the use of interstate transportation and wire communications facilities to conduct an illegal betting and wagering business in violation of 18 U.S.C. 1084 and 1952 (R. I, 1–5). Petitioners were sentenced to three years imprisonment (R. IV, 21–22).[3] The court of appeals affirmed per curiam (R. V, 20–21).

The pertinent evidence may be summarized as follows:

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[2] Copies of the petition were served under Rule 33(2) of the Rules of this Court on December 17, 1964.

[3] Simpson was sentenced to serve three years on the conspiracy count. Two-year sentences to be served concurrently with each other and with the sentence on the first count were imposed for each of the substantive offenses (R. IV, 21–22).

In 1962 and 1963 Jerry Marcus placed bets with one Vozzola, first in Washington and then by telephone from New York (R. II, 40). As a result Vozzola owed Marcus several thousand dollars (R. II, 77, 94–95) which he was unable to pay (R. II, 40–41, 77–78). Marcus pressed Vozzola for payment (R. II, 57–59, 89–90, 93–94), and Vozzola sought a loan from petitioner Rorer to pay Marcus and to "take him off my back" (R. II, 78). In August 1963, Marcus came to Washington and was introduced by Vozzola to Rorer (R. II, 43). Thereafter, Marcus placed bets with Rorer by telephone from New York to Rorer's home in Alexandria (R. II, 44–46, 64).

On October 1, 1963, Marcus flew to Washington and was met by petitioners Rorer and Simpson (R. II, 47). Marcus gave Simpson $1250 which Simpson counted and retained (R. II, 47–48).[4] Marcus then placed wagers with Rorer and Simpson on the world series and on various football games (R. II, 47–48).

Marcus returned to New York and placed wagers with Rorer by telephone on October 5 and 6, 1963 (R. II, 49–50). As a result of these wagers, Marcus became indebted to Rorer for about $10,000 but refused to pay (R. II, 50, 62). Vozzola discussed with both petitioners the fact that Marcus had said he had "turned them in" to the F.B.I. (R. II, 83–84).

During the period after Vozzola turned Marcus over to petitioner Rorer, Vozzola would "lay off" some num-

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[4] Marcus had once paid Rorer by a money order made out to Vozzola. Rorer objected to this method and insisted that payment be in person (R. II, 46–47).

bers with Rorer. Sometimes Simpson answered the telephone and Vozzola would ask his advice about a game because Simpson was a good handicapper (R. II, 81–82). On at least one occasion when petitioner Simpson answered the telephone, Vozzola asked him how they were getting along with Jerry Marcus (R. II, 87–88).

On November 1, 1963, F.B.I. agents obtained arrest warrants for both petitioners and search warrants for petitioner Rorer's home and car. Petitioner Rorer was found in the basement and placed under arrest (R. II, 170–173). The agents seized an adding machine, a copy of the Washington Post open to the horse racing charts and some "flash" paper, which burns rapidly and leaves no ashes (R. II, 154–157). Rorer's car was searched, and "flash" paper was found (R. II, 168–169). One Special Agent answered Rorer's telephone from 3:45 p.m. to 5:20 p.m. and received thirty-four calls—an average of more than one call every three minutes (R. II, 112–119). Numerous phrases relating to wagering appeared in the notes of the calls, including "What the post time for the 7th at Laurel"; "What was the first?"; "Did you get the middle yet?"; "Tell him the Blue Boy did not show this morning." At various times, the callers asked for Jiggs or Junio, the names by which Simpson was known (R. II, 76, 113–119, 129–130).

Petitioner Simpson was arrested in the basement of his home (R. II, 103–104). As the arresting officer reached the foot of the stairs to the basement, he observed a flash of light coming from the fireplace in front of which Simpson was standing. He removed some

ashes and debris later identified as football pool or parlay cards normally used in bookmaking operations (R. II, 104–106, 191–192).

ARGUMENT

1. Petitioner Rorer asserts that evidence obtained from his home should have been excluded on the ground that the entry of the F.B.I. agents into the house was unlawful under 18 U.S.C. 3109 (Pet. No. 684, at 4–5).[5] Three times, at ten-second intervals, while knocking on petitioner's door and ringing the door bell, the agents identified themselves as representatives of the F.B.I. and stated that they had search and arrest warrants (R. II, 171–172). Other agents then arrived, and the door was broken down (R. II, 122, 172). The interval of time from beginning to end was "at least one minute" (R. II, 171).

The only issue presented is whether the lapse of time constituted a "refused admittance" under the statute. This elapse of at least one minute[6] was sufficient

[5] Section 3109 provides that "[t]he officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

[6] Petitioner's allegation of inconsistent testimony by F.B.I. agents (Pet. No. 684, at 4) is unfounded. Agent Cohrs, who was at the door from the beginning, stated that the time interval was at least a minute (R. II, 171). Agent Pfaff, who was called from the truck after the door bell had been rung three times at ten-second intervals, stated that he was at the door fifteen or twenty seconds before forcible entry (R. II, 123). Agent Crowder, who was summoned from the truck, testified it was two or three minutes before he was called to the door (R. II, 161).

under the circumstances. The search warrant stated that petitioner possessed "flash" paper which could be rapidly destroyed, so that a substantial delay might have resulted in successful destruction of the contraband, particularly since petitioners knew they had been reported to the F.B.I. (R. II, 83–84). Under the circumstances, the statutory condition for forcible entry (and any possible constitutional protection) was satisfied. *McClure* v. *United States*, 332 F. 2d 19 (C.A. 9), petition for certiorari pending, No. 258 Misc., this Term; *Masiello* v. *United States*, 317 F. 2d 121 (C.A. D.C.). Since announcement was made, this case presents no issue regarding the nature of the exigent circumstances which would excuse a failure to announce—a question which was specifically reserved in *Miller* v. *United States*, 357 U.S. 301, 309.

2. Petitioner Simpson asserts that there is insufficient evidence to support his conviction on the conspiracy count or the substantive counts (Pet. No. 724, at 6–7). However, the evidence fully justified the jury in concluding that Simpson was an informed and interested participant in the interstate gambling transactions between Rorer and Marcus. On October 1, 1963, he accompanied Rorer to meet Marcus and was given $1,250 by Marcus. At that same meeting Marcus placed additional bets. Vozzola indicated that he often called Rorer's residence and talked to Simpson about gambling information. On at least one occasion he inquired of Simpson how they were getting along with Marcus. Simpson was present at a conference with Vozzola and Rorer to discuss the implications of Marcus' report of their activities to the F.B.I. Just prior to his arrest,

Simpson burned football parlay cards in his fireplace. On this evidence, his participation with Rorer in operations with an interstate scope was clearly established, as was his knowledge of Marcus' wagering activities. Since the sentence on the conspiracy count is longer than those on the substantive counts which run concurrently with it, the proof of conspiracy is adequate to support the judgment. *Lawn* v. *United States*, 355 U.S. 339, 359; *United States* v. *Johnson*, 319 U.S. 503, 518.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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